NARINDER KAUR

v.

DEYOH OPONG & ORS.

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
IAN HC CHIN J
[ORIGINATING SUMMONS NO: 171 OF 1986]
11 JANUARY 1997

LAND LAW: *Adverse possession - State land - Whether can be raised against state land and alienated land - No adverse possession if occupation unlawful - Sabah Land Ordinance (Cap. 68), s. 6*

LAND LAW: *Customary land - Native customary rights - Land alienated and title issued prior to claim - Whether claim can be made after title issued - Sabah Land Ordinance (Cap. 68), s. 13*

EVIDENCE: *Presumption - Regularity - Title to land not challenged for 40 years - Whether presumption of regularity applies - Evidence Act 1950, s. 114(e)*

The plaintiff brought an action against the defendant squatters for possession of land of which she had been the registered owner since 11 July 1975, after a transfer for consideration from her sister who was in 1956 transferred the land by their father. The plaintiff alleged that in 1981, she saw illegal structures built on her land, which had not been there before, and people staying in them. Her attempts to evict them with the help of the relevant authorities proved unsuccessful and the plaintiff brought this action in 1986. Only five defendants appeared in Court at the hearing. Counsel for the defendants raised the following defences: (i) adverse possession under item 112 of the Schedule to the Limitation Ordinance; (ii) customary native rights under the Sabah Land Ordinance (Cap 68) ('the Land Ordinance'); (iii) limitation, as more than 12 years had passed since the defendants' occupation became adverse to the plaintiff; and (iv) the alleged permission to occupy the land granted by the plaintiff's father and mother to the defendants.

Held:

[1] The defendants who were absent had to prove that they had been staying on the land for 12 years and they had failed to do so. They were to vacate the land within 90 days and costs were awarded against them.

[2] Title to the land was issued to the plaintiff's father on 8 February 1951. Under s. 13 of the Land Ordinance, submission of claims to native customary rights must be made before title is issued. The fact that the

title had been issued and was not challenged for 40 years raised the presumption of regularity under s. 114(e) of the Evidence Act 1950. Therefore, unless the issue of the title to the land could be assailed, the title had extinguished whatever native customary rights that may have existed prior to its issuance.

[3] Furthermore, claims to native customary rights can only arise against state land and not against alienated land.

[4] Section 6 of the Land Ordinance prevents adverse possession from being raised against state land where the occupation of the land is unlawful. State land should be read to include alienated land to avoid situations, for example, where persons could obtain adverse possession to alienated land which was due to revert to the State, and thus prevent such reversion. In this case, the facts showed that the plaintiff's father had not given any of the defendants permission to build on the land and the mother was not empowered to give such permission. As such, the defendants' occupation of the land was unlawful and they were not entitled to raise adverse possession.

Obiter dicta

[1] As for the issue of limitation, assuming the defendants' occupation was lawful and they were entitled to claim adverse possession against the land, time began to run when the defendants' possession became adverse to the plaintiff. In this case, although the defendants were clearly occupying the land without the plaintiff's consent, the defendants were unable to prove they had occupied the land for the requisite 12 years.

[Judgment entered for the plaintiff. Defendants ordered to vacate land within 10 days.]

Cases referred to:

Chinese Bankers Trust Co. Ltd. v. Low Cheng Kiat & Anor. [1996] 1 MLJ 239 ***(refd)***

Zaibar Auto (M) Sdn. Bhd. & Anor v. Shell Malaysia Trading Sdn. Bhd. [1996] 4 CLJ 212; [1996] 2 MLJ 221 ***(foll)***

Legislation referred to:

Evidence Act 1950, s. 114(e)

Limitation Ordinance, Item 112 Schedule, s. 26

Sabah Land Ordinance (Cap 68), ss. 4, 6, 13, 16, 88

Other sources referred to:

Laws of Limitation, Rustomji, 5th Edn., Vol. 2, p. 369

For the plaintiff - Sugumar Balakrishnan; M/s. Sugumar & Co.
For the defendants - Razali Awang; M/s. Azizzah, Joifin Mohd Dun & Co.

JUDGMENT

Ian HC Chin J:

Introduction

On 26 November 1986 Narinder Kaur ('the plaintiff') filed the present originating summons against the following persons for possession of a parcel of land described in Penampang Country Lease No. 215100422 ('the said Land'), *viz*.:

1. Deyoh Opong (H0016452)
2. Jumin Buayan (H0147632)
3. Ratanah Keri (H0059838)
4. Yusof Daud (H0068588)
5. Liman Meh (H0045691)
6. Bina Keri (H0039291)
7. Kaam Keri (H0046404)
8. Libah Liman (H0396299)
9. Salamah Meh (H0060358)
10. Ismail Naim (H0496571)
11. Dg. Junah Perak (H0512999)
12. Derus Harris (J0129926)
13. Jurah Sih (H0030812)
14. Dg. Siah Mandaut (H0138891)
15. Masri Maslin
16. Sabtu Lahir (H0088926)
17. Atoh Udin (H0047607)
18. Sunir Ghani (H0599721)
19. Amir Shah Sabtu (H0135026)
20. Dr. Hong

21. Adsin Shai

22. Seremah Sapong (H0016453)

23. Aisah Atuh (H0065610)

24. Anjas Alias (H0569835)

25. Aissa Dusin (H0120970)

26. Parais Shariff Baba (H0193593)

27. Aminah Shariff Baba (H016079)

28. Aminah Shariff Baba (H0608813)

29. Awang Besar Ahmad (H0267684)

30. Bulalin Sungkah (H0496571)

Years later, on 8 April 1991, the originating summons was ordered to be treated as if begun by writ. Again years later, on 14 July 1995 a summons for directions was taken out and it was only on 10 July 1996 that this action was set down for trial. The trial was then held on 13 and 15 November 1996 whence I adjourned the case to consider the judgment.

Evidence of Case

On 11 July 1975 the plaintiff became registered owner of the said Land after a transfer for consideration from her sister who was in 1956 transferred the land by their father. Both her sister and father had since deceased. After becoming owner, the plaintiff visited the said Land every two or three months. At that time, the plaintiff alleged, there were no structures on the said Land. However, in 1981 during her visit, she saw structures built on her land and people staying in them.

She then wrote to the Assistant Collector of Land Revenue, Penampang, on 25 May 1981 to seek help to evict the squatters and this brought about a reply on 11 June 1981 asking her to point out the illegal structures. It was on 18 December 1984 that the said office wrote to the squatters to vacate the said Land however the effort was not successful and the plaintiff was informed accordingly on 11 June 1985. Then she instructed a law firm which on 13 July 1985 issued a letter to the squatters to quit, again without success. Hence the proceedings. She testified that she had never given any of the squatters any permission to build their houses there.

Only five of the defendants, the 2nd, 6th, 9th, 17th and 22nd defendants, bothered to appear in Court and they were represented by Razali Awang who also represented the rest of the defendants. Seremah Sapong testified that she

built the house in Kg. Muhibbah in the 1960s and it was after the plaintiffs mother had told her "to build on the other side of the land" and showed her the place to build her house. She also owned two other houses in Kg. Muhibbah. She also said: "The mother asked me to build the house outside the land and not inside because the land belonged to the daughter". She also said that the place showed by the mother was the place where she had built the house. When cross-examined she denied that her houses were on the said Land. Salamah Meh said she had stayed in Kg. Muhibbah for 60 years and she had built the house there. She also said there were many other houses there when she built her house. She pleaded with the Court that she had no place to go to. Atoh Udin testified that he cannot remember when he built the house. Yunus Samaad, not a named-defendant, said he had been staying in a house there with his sister since the 1960s. Jumin Buayan testified that the house was built by him and was about 30 years old and he said he went into the land and simply built there. The last defendant to appear and testify was Bina Kiri who said she built her house about 10 years ago. If the evidence which I have just referred to appears sketchy, it is not a result of my summary but that is all there is.

The Contentions

As regards the absence of the other defendants, Razali Awang submitted that the plaintiff had failed to prove that they have not been staying on the said Land for more than 12 years and that, therefore, the other defendants are entitled to the defence of limitation. The short answer to that it is for them to prove that they had been staying on the said Land and this they had failed to do so. Therefore, in respect of them, the Court orders that they vacate the said Land and they have 90 days in which to do so and costs are awarded against them. As for the defendants who turned up in defence, learned Counsel argued that they cannot be evicted because – (1) of their adverse possession of the land for 12 years, (2) the plaintiff's action is statute-barred and (3) the houses were built with the consent of the plaintiff's father and mother.

Adverse Possession for 12 Years

Razali Awang referred to *Chinese Bankers Trust Co. Ltd. v. Low Cheng Kiat & Anor*. [1966] 1 MLJ 239 for support for his proposition that a landowner in Sabah can be deprived of his or her land if there was adverse possession for a period of more than 12 years. Native customary right was also invoked. This is what learned Counsel actually said:

> It is the defendants' argument that since they have [occupied] the said Land for more than 12 years prior to the date of the plaintiff instituting her application in 1986, the defendants have acquired rights and title by adverse possession in the said Land through native customary rights.

And, after referring to the evidence, also said this:

> Section 15 of the Sabah Land Ordinance (Cap. 68) provides definition of customary rights. Customary rights [are] held, under s. 15 of the Land Ordinance, among others, to be "(e) land that has been cultivated or built on within three years".
>
> It is submitted that as the defendants have cultivated, planted crops and built houses on the said Land and further believe that the said Land becomes their own land by way of customary rights, therefore the defendants' adverse possession in the said Land were actual, visible, exclusive, hostile and had continued for more than 12 years to create a bar under the Sabah Limitation Ordinance.

Customary native rights under the Land Ordinance (Cap. 68) and adverse possession under item 112 of the Schedule to the Limitation Ordinance under obviously two distinct matters and have to be addressed separately. Therefore, I will treat the matters separately. First to the question of native customary rights. The title to the said Land was issued to the father on 8 February 1951. None of the defendants had said that they came unto the said Land before the issue of the title. Therefore, they must have come unto the said Land after the issue of the title to the said Land. This fact has a vital bearing on the issue because s. 13 of the Land Ordinance enjoins a Collector to call for submission of claims to native customary rights before the title to the said Land which the father had applied for can be issued to the father. If they were claims submitted and upheld by the Collector, the Collector can cause a native title to be issued or money be paid as compensation to the successful claimant. It is only after that process that the father was entitled to be issued the title. The fact that the title had been issued to the said Land and the fact that there is no complain the due process was not carried out must mean, subject to proof to the contrary, that the process of enquiring into native customary rights had been gone into and was already dealt with as otherwise the title would not have been issued to the father. The presumption of regularity (s. 114(e) Evidence Act 1950) applies and it would be incumbent upon the claimants of native customary rights to challenge the issue of the title if they felt that there was no due process. Nothing of this sort had taken place for the past 40 years and therefore such claims, even if they existed, were deemed to have been dealt with already after the issue of the title to the said Land. Unless the issue of the title is assailed, the title to the said Land extinguished whatever native customary rights that may have existed prior to the issue of the title. This brings me to the question of whether you can assert native customary rights on land that had already been alienated. For this purpose, I will assume for the moment that the defendants concerned had gone into the said Land after the father was issued a title. Can a native in such a circumstance claim native customary right against a land which had already

been alienated. In my view no such claim can arise. The manner in which such claims once established had to be dealt with provides the indication as to whether such a claim can arise against alienated land. Under s. 16 of the Land Ordinance, such right once established have to be dealt with the issue of a native title or the payment of compensation to the claimant. How can this be done in respect of the said Land which had already been issued to the father and now registered in the name of the plaintiff. That is impossible without grabbing unlawfully the said Land from the plaintiff. No such difficulty arise if the said Land was still state land. This means customary native rights can only be claimed against state land and not alienated land and since the said Land is alienated land, the claim of customary native right would have failed had it been brought before the proper forum under the Land Ordinance.

As for adverse possession, before examining the case cited by learned Counsel, it falls to be examined whether adverse possession had any application to alienated land. The Land Ordinance, s. 6, makes provision for unlawful occupation not to establish any right and it is in the following terms:

> 6. Notwithstanding anything to the contrary contained in any written law relating to limitation of suits in force in Sabah, no unlawful occupation of State land or land reserved for a public purpose or residential purpose or occupation under temporary licence for however long a period shall establish any right, title or interest in State land or land reserved for a public purpose or residential purpose or create any right to demand a title to such land from Government.

"State land" has been defined in s. 4 in this manner:

> "State land" means all lands which have not been and may not hereafter be reserved for any public purpose, or which have not been and may not hereafter be leased or granted to or are not and may not hereafter be lawfully occupied by any person, *and includes all lands which, at the commencement of this Ordinance, may have become or which hereafter may become forfeited by reason of any breach of the conditions on which the same have been lawfully occupied, or which have been or may hereafter be surrendered to the Government by the lawful owner thereof;*

The words in italics would appear to include alienated land, of which the said Land is, since it is liable to be forfeited or surrendered. Section 6 prevents adverse possession being raised against State land which, it would seem, has been defined to include alienated land. Such a definition stands to reason. Take for example the case of an alienated land whose lease has five years to run and then natives unlawfully went onto the land and there plant fruit trees or erect building there and thus by the end of the third year would qualify for native customary rights. The lease then expired or was surrendered back to the Government before its expiry. By then the natives would have satisfied

the conditions for acquiring native customary right because of the cultivation or erection of the house and could then demand the Collector to either issue them with a native title or pay compensation. Thus, the natives could by such adverse and unlawful possession of alienated land prevent a reversion of the alienated land to the Government after the lease has expired which they could not do with state land. This can be avoided if the other construction of the definition of "State land" is and, in my view, should be adopted, that is, it includes alienated land as well which means, under s. 6, the Limitation Ordinance is made inapplicable unless the occupation in the first place was lawful. What, then, is lawful occupation? In the context of the said Land, it must be with the permission of the father or sister (not the plaintiff because it is not the defendants' case that the plaintiff had given any permission) who were at one time and another the registered owner. In so far as the father is concerned the permission if it was given can only be validly given at the time when the father was still the registered owner which was between 8 February 1951 (the date of the issue of the title) and 1956 (the year the father transferred the said Land to the sister) or even shortly before that period but after the father had applied for the said Land.

Jumin bin Buayan said his house was (at the date of trial) 30 years old, which means some time in the year 1966, and that he went onto the said Land and built there. This means the father could not have given him permission since by that year the father was no longer the owner. As for Bina Kiri, she said she built the house 10 years ago which would be in 1986 and that was about all she said. She did not claim any permission and clearly in her case permission is out. The defendant Salamah Meh claimed to have built her house 60 years ago which puts the year at 1936 and she also did not claim any permission from the father or from anyone. As for Atoh Udin he said he simply went onto the said Land and there built a house and that he was the first one to do so. He also did not claim any permission. Seremah Sapong, the wife of Atoh Udin, testified that she built her house in 1960 and it was the mother of the plaintiff who asked her to build on the said Land, therefore obtaining permission from the father is also out of the question. Yunus Samaad, who is not a defendant, testified that he was the Kampong Chief and that he had stayed in the house of his sister Seremah Sapong since 1960 and he said neither the father nor the mother objected to the building of the houses on the said Land. Having adverted to the evidence, it is clear that no permission was ever given by the father for the defendant to build on the said Land. Therefore, it is clear that when the father was the registered owner he had not given anyone of the defendants permission to build on the said Land and none of them alleged so. This takes me to the period the sister was the registered owner, which is from 1957 to 1975. It was during this period that the houses were alleged by the defendants to have been paid but none of the defendants nor

the witness had said that the sister had given them permission to build. So permission was also not obtained during the time the sister was the owner. From 1975 onwards, the plaintiff became the registered owner and it is not disputed that she never gave any permission. As for the mother, she could never give any valid permission. It is therefore my view, bearing in mind that only a registered owner would be empowered to give such permission (*Zaibar Auto (M) Sdn. Bhd. & Anor. v. Shell Malaysia Trading Sdn. Bhd.* [1996] 4 CLJ 212; [1996] 2 MLJ 221), that it is beyond doubt that no permission was ever given by the legal owner of the said Land for any of the defendants to build on the said Land which means the occupation of the said Land by the defendant is unlawful which disentitles them to raise adverse possession.

As for the 12-year limitation, which I will next consider in case I am wrong in my conclusion that it has no application because the entry to the said Land was unlawful, it applies to a suit for possession of immovable property and the time begins to run when the possession of the defendant becomes adverse to the plaintiff. But first to the contention of Sugumar Balakrishnan, learned Counsel for the plaintiff, that since the title of the plaintiff is indefeasible there cannot be any adverse possession. This is what learned Counsel said:

D. ADVERSE POSSESSION

14. ...

15. The plaintiff's ownership of the said land is based on registration, i.e. s. 88 of the Land Ordinance. Although the Land Ordinance is not modelled on the Torrens system of land registrations, and does not have provisions conferring indefeasibility of title to or interest in land on registration which is a feature of central importance to the Torrens system, however Chapter V particularly s. 88, of the Land Ordinance does imply the basis Torrens concept: *Borneo Housing Mortgage Finance Bhd. v. Time Engineering Bhd.* [1996] 2 CLJ 561; [1996] 2 MLJ 12.

16. Submit that by implication the doctrine of indefeasibility of title applies to the plaintiff's title to the said land. Submit that there can be no adverse possession against the registered owner of land or any person entitled to a registered interest therein since a registered owner is not a person in adverse possession of the land: *Ng Chim & Ors. v. Low Boon Beng* [1994] 3 CLJ 803; [1994] 3 AMR 338:1959.

17. In *Jamir Hassan v. Kang Min* [1991] 3 CLJ 2490; [1992] 2 MLJ 46 the High Court held that the doctrine of adverse possession has no application in the Torrens system.

18. In any event the defendants appear to have abandoned this issue as no evidence was led in this connection.

In so far as the authorities cited by learned Counsel are concerned, they do not turn on the interpretation of the relevant provisions under the Sabah Land Ordinance and under the Limitation Ordinance, which I have referred to, that are under consideration. Though I agree with learned Counsel that s. 88 in a way recognizes indefeasibility of title, the Land Ordinance did not contain any provision that excludes the application of the Limitation Ordinance. In fact, reference was made in s. 6 to adverse possession, a matter covered by the Limitation Ordinance, and by mentioning and yet not excluding it, must have been the intention that the Limitation Ordinance was not intended to be excluded totally but except where the entry to the land was unlawful. To say that the Limitation Ordinance, item 112, has no application to land, would be totally against the express and plain wordings of that item. Even more so if s. 26 of the Limitation Ordinance is taken into account where it says:

> 26. At the determination of the period limited by this Ordinance to any person for instituting a suit to recover possession of immovable property the right and title of such person to the immovable property, for the recovery whereof such suit might have been instituted within such period, shall be extinguished.

Therefore, it is my view that the Limitation Ordinance applies to a suit for possession of land which the present suit is one. Was there, then, adverse possession on the part of the land? Clearly there was since the defendants were occupying part of the said Land to the exclusion of the plaintiff and without any consent from the plaintiff which satisfies the test of adverse possession, that is, it was hostile, notorious and exclusive (Rustomji on *Laws of Limitation*, 5th Edn., Vol. 2, p. 1369). Was the adverse possession for more than twelve years before the commencement of this suit, is the next question that has to be answered. Only Salamah Meh and Seremah Sapong said that they had been occupying the said Land for more than 30 years but the plaintiff had testified that the squatters only came onto the land in 1981 which was supported by her immediate action by seeking the help of the District Office which proved to be in vain. On the other hand, the two defendants were not able to produce a single document to prove their occupation for that long a period, like electricity bills which were produced by some of the defendants but were for a much more recent period. In the end, I am inclined to believe the plaintiff that all the defendants came onto the land sometime after 1981.

Conclusion

In the premises, I enter judgment for the plaintiff and grant an order directing the said defendants and the witness who appeared in Court to also vacate the said Land within 90 days hereof. It would be a sad day, assuming the

defendants are natives of Sabah and assuming they have not hitherto owned any land, if the Government of the State of Sabah does not step in to assist them. In a state like Sabah where there is such abundance of land, there is no reason for any native of Sabah to be landless. Much as I sympathise with the defendants, their misfortune is further added by my award of costs against them which under the law I must do and which I order.

Reported by Anne Khoo